Supreme Court, U.S.
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No. 09-1145

In The Supreme Court of the United States

MILLIE MAX,

Petitioner,

v.

REPUBLICAN COMMITTEE OF LANCASTER COUNTY, DAVID M. DUMEYER, In his Official Capacity as Chairman of the Republican Committee of Lancaster County, ANDREW HEATH, and LANCASTER COUNTY REPUBLICAN HEADQUARTERS, a nonprofit corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Court should deny Petitioner's Petition for Writ of Certiorari where the Third Circuit's decision (1) does not conflict with the relevant decisions of this Court, (2) is consistent with clearly established federal precedent, (3) does not present an important question of federal law that needs to be settled by the Court, and (4) does not conflict with a decision of another court of appeals or a state court of last resort on the same issue?

II. Whether the Republican Committee of Lancaster County and its officials (the "RCLC") are state actors during the Commonwealth of Pennsylvania's primary election where the Commonwealth has not delegated to the RCLC the power to determine who will appear as a candidate on the general election ballot under Pennsylvania's Election Code?

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STATUTORY PROVISIONS INVOLVED

FEDERAL LAW

42 U.S.C. § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

PENNSYLVANIA ELECTION CODE

25 P.S. § 2862: All candidates of political parties, as defined in section 108 of this Act, for the offices of United States Senator, Representative in Congress and for all other elective public offices within the State, except that of presidential electors, shall be nominated, and party delegates and alternate delegates, committeemen and officers who, under the provisions of Article VIII of this Act or under the party rules, are required to be elected by the party electors, shall be elected at primaries held in accordance with the provisions of this Act, except as otherwise provided in this Act . . . .

25 P.S. § 2882: Candidates of the various political parties for nomination, except for the office of President of the United States, who receive a plurality of votes of their party electors in the State, or in the political district, as the case may be, at the primary election, together with the candidates for the office of

presidential elector nominated as herein provided, shall be candidates of their respective parties, and it shall be the duty of the proper county boards to print their names upon the official ballots and ballot labels at the succeeding election . . . .

25 P.S. § 2837: There may be in each county a county committee for each political party within such county, the members of which shall be elected at the spring primary, or appointed, as the rules of the respective parties within the county may provide. The county committee of each party may make such rules for the government of the party in the county, not inconsistent with law or with the state rules of the parties, as it may deem expedient, and may also revoke, alter or renew in any manner not inconsistent with law or with such state rules, any present or future county rules of such parties. No such rules shall be effective until a certified copy thereof has been filed in the Office of the County Board of Elections. The members of all other party committees, and all other party officers whose election is required by the party rules, shall also be elected at the spring primary, in the manner provided by this Act.

25 P.S. § 2642: The county boards of elections, within their respective counties, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act, which shall include the following: (a) . . . to present to the court petitions for the division, redivision, alteration, change or consolidation of election districts in proper cases, (b) To select and equip polling places that meet the requirements of this act, (c) To purchase, preserve, store and maintain primary and election equipment of

all kinds . . . . (d) To appoint their own employees, voting machine custodians, and machine inspectors, (e) To issue certificates of appointment to watchers at primaries and elections, (f) To make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors, (g) To instruct election officers in their duties . . . and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county . . . . (h) To prepare and publish . . . all notices and advertisements in connection with the conduct of primaries and elections . . . . (i) To investigate election frauds, irregularities and violations of this act, and to report all suspicious circumstances to the district attorney, (j) To receive and determine . . . the sufficiency of nomination petitions, certificates and papers of candidates . . . . (k) To receive from district election officers the returns of all primaries and elections, to canvass and compute the same, and to certify . . . the results thereof . . . . (l) To publicly announce by posting at its office the results of primaries and elections . . . ; to provide the results to the Secretary of the Commonwealth; and to issue certificates of election to the successful candidates for said offices, (m) To prepare and submit . . . a report to the Secretary of the Commonwealth in the form prescribed by him, which shall contain a statement of the total number of electors registered in each election district, together with a breakdown of registration by each political party or other designation . . . . (n) To annually prepare and submit . . . an estimate of the cost of primaries and elections . . . . (o) To perform such other duties as may be prescribed by law . . . .

STATEMENT OF THE CASE

Petitioner, Millie Max, filed a claim under 42 U.S.C. § 1983 against Respondents, the RCLC, David M. Dumeyer ("Dumeyer"), in his official capacity as former Chairman of the RCLC, Andrew Heath ("Heath"), the former Executive Director of the RCLC, and the Lancaster County Republican Headquarters, a nonprofit corporation that owns the real estate used for the RCLC headquarters. In her Amended Complaint, Petitioner alleged that Respondents infringed her First Amendment rights during the 2007 Pennsylvania primary election campaign during which Petitioner, an elected committeewoman of Respondent RCLC, actively campaigned against two of the six RCLC endorsed judicial candidates for seats on the Court of Common Pleas of Lancaster County, Pennsylvania.

With respect to the facts alleged in support of her claims under Section 1983, Petitioner's allegations involved an alleged "threat," allegedly made by then RCLC Executive Director Heath to trace a license plate; a meeting to be held after the primary election; poll-workers allegedly sent by Respondents to "observe and report back" on Petitioner's primary election day activities; and a letter sent after the primary by then RCLC Chairman Dumeyer to Petitioner in which Dumeyer expressed concerns about Petitioner's conduct, the confusion she was creating among registered Republican voters as a result of her conduct, and asking her to consider whether, in good conscience, she should continue her service on the RCLC, if she felt compelled to oppose the RCLC's endorsed candidates because of her personal convictions. Petitioner's Amended Complaint did not

allege any state participation in, authorization of, encouragement, or even knowledge of Heath's and Dumeyer's alleged conduct.

The unsupported legal theory advanced by Petitioner and her counsel throughout the litigation in support of their contention that Respondents were liable under Section 1983 was that the Commonwealth of Pennsylvania had delegated its sovereign, plenary authority to determine who shall appear on Pennsylvania's general election ballot to the RCLC through the primary election process. Petitioner's and her legal counsel's theory was both factually and legally incorrect and without any legal support under any statute or case law.

A review of Pennsylvania's Election Code, 25 P.S. §§ 2601, *et. seq.*, readily demonstrates that Pennsylvania has not made any such delegation to "political parties." Rather, the power to select candidates rests with the *registered voters* of the major political parties, the party electorate. The registered voters of each party, not the parties themselves, wield the power to decide who will appear on the general election ballot. The RCLC also has no official role in the conduct of the primary election itself. The Lancaster County Board of Elections is the sole entity responsible for conducting elections within the county. *See* 25 P.S. § 2642. The only authority granted to the RCLC under the Election Code in connection with Pennsylvania's primary election is the option afforded to it under the Election Code to elect members to the Committee during the primary election. *See* 25 P.S. § 2837. In all of the Motions and Briefs filed by Petitioner in connection with this litigation, including her Petition for Writ of Certiorari before the Court,

Petitioner and her counsel do not cite, and have never cited, a single statute or case that supports her contention that Pennsylvania delegated any authority or power to the RCLC to determine who shall appear on Pennsylvania's general election ballot.

The RCLC is a private political organization, not a creature of the state. The RCLC does not set voter or candidate qualifications and does not exercise any control over ballot access or decide who will or who will not appear on the ballot as a candidate in the primary or general election. In addition, the RCLC does not conduct elections, has no authority to designate or certify poll watchers in the primary election, and does not tabulate votes or certify election results. The Commonwealth has not delegated any power or authority to the RCLC in connection with the primary. Rather, the RCLC endorses candidates selected through an internal endorsement process conducted pursuant to the Committee Rules and assists with the campaigns of its endorsed candidates on a voluntary basis. The RCLC does not have the power to place its endorsed candidates on the general election ballot. This is the full extent of the RCLC's role in connection with the primary election.

Petitioner's and her counsel's entire argument is based upon the false premise that the registered Republican voters in Lancaster County and the RCLC are one and the same. The Court of Appeals for the Third Circuit recognized this false premise by stating that the Petitioner's argument incorrectly conflates the role of the RCLC with that of the electorate. *Max v. Republican Comm. of Lancaster County*, 587 F.3d 198, 200 (3d Cir. 2009). Without this false conflation of the registered Republican voters in Lancaster County with

the RCLC, Petitioner's argument is exposed as specious.

The Court of Appeals for the Third Circuit also addressed and rejected each and every one of the arguments made by Petitioner on appeal, many of which are merely repeated in Petitioner's Petition for Writ of Certiorari without addressing the issues raised by the Third Circuit. Of particular importance, Petitioner did not address the Third Circuit's statement that the principal cases relied upon by Petitioner, *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953), are clearly distinguishable from Petitioner's case for at least two reasons. *Id.*, at 201. The Third Circuit first noted that *Smith* and *Terry* involved a state working in concert with a political party to deny African-American participation in primaries, and there was nothing in the record in this case to suggest that Pennsylvania delegated any authority to Respondents with the intention of violating constitutional rights. *Id.* The Third Circuit also noted that, unlike *Smith* and *Terry*, this case involved the internal affairs of a political organization, and that the United States Supreme Court has long recognized the First Amendment right of a political organization to limit its membership as it wishes. *Id.* Petitioner continued to principally rely on *Smith* and *Terry* in her Petition without addressing the fatal flaws in her argument that were raised by the Third Circuit.

Throughout the Opinion, the Third Circuit characterized Petitioner's contentions as "unavailing" and "inapt" and stated that Petitioner's assertions did not even rise to the level of "plausibility," noting that "[Petitioner] cannot plausibly assert that the

'fingerprints of the state' are on the alleged infringement of her rights." *Id.*, at 200-01. The Third Circuit rejected Petitioner's claim that Heath's alleged threat to trace a license plate constituted state action. *Id.*, at 202. Petitioner did not allege that the Commonwealth had any role in connection with Heath's alleged threat. The Third Circuit also rejected Petitioner's argument that having poll-workers observe and report on her behavior constituted state action because the Respondents themselves were not poll watchers and, at most, used poll-workers merely to obtain information. *Id.*

The United States District Court for the Eastern District of Pennsylvania and the Court of Appeals for the Third Circuit correctly dismissed this action as the result of Petitioner's failure to allege any facts or law establishing the state action element necessary to state a claim under Section 1983.

ARGUMENT

I. THE COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE THERE IS NO COMPELLING REASON FOR THE COURT TO REVIEW THIS MATTER

"A petition for writ of certiorari [is] granted only for compelling reasons." United States Supreme Court Rule 10. There are no compelling reasons present in this matter that would warrant granting certiorari. The Third Circuit's holding that Petitioner failed to allege any state action necessary to state a claim under Section 1983 is consistent with clearly established federal precedent. This case does not

present an important federal question that needs to be settled by the Court. In addition, the Third Circuit's decision does not conflict with the relevant decisions of this Court. Finally, the Third Circuit's decision also does not conflict with a decision of another court of appeals or a state court of last resort on the same issue.

A. The Third Circuit Correctly Affirmed the Dismissal of Petitioner's Section 1983 Claim for Failure to Allege State Action, Consistent With Clearly Established Federal Precedent

Petitioner incorrectly contends that the Third Circuit's decision conflicts with this Court's decisions in *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953). In both *Smith* and *Terry*, the State of Texas had delegated to the Democratic Party its authority to determine the qualifications of persons who could vote in the primary election.[1] In turn, the Democratic Party, exercising the authority delegated to it by the State of Texas, determined that only whites would be permitted to vote in the primary election. This Court held in *Smith* and *Terry* that the exclusion of African-Americans based upon their race by the Democratic Party, pursuant to the authority delegated to it by the state, constituted state action sufficient to state a claim under the Civil Rights Act.

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[1] Notably, the prohibition against African-Americans voting in the Texas primary was originally contained in a statute enacted by the Texas legislature. *See Smith*, 321 U.S. at 658.

This Court in *Smith* and *Terry* did not hold, as Petitioner contends, that "political parties are State actors during the primary election by virtue of the authority given to political parties in selecting candidates for the general election ballot in a primary election." (Petition p. 8). First, these cases dealt with voter qualifications, not candidate selection. Second, in *Smith* and *Terry*, the Court determined that the political parties involved in each case were state actors under the specific statutory schemes at issue, which directly delegated authority to the political parties to determine voter qualifications. The authority directly delegated to the political parties in *Smith* and *Terry* created a nexus between the state and the alleged actions that gave rise to the claims. In this case, the Third Circuit correctly determined that, under the Pennsylvania Election Code, no nexus existed between the RCLC and the actions that allegedly gave rise to Petitioner's claim. The Pennsylvania Election Code delegates the power to decide who will appear on the general election ballot to the voters, not to the political parties. Because *Smith* and *Terry* are factually distinguishable from Petitioner's claim, the Third Circuit's decision does not conflict with this Court's decisions in those cases.

Petitioner's reliance on *New York State Board of Elections v. Lopez-Torres* is also misplaced. In *Lopez-Torres*, under the New York statutory electoral scheme, delegates elected by party members nominated judicial candidates at a convention controlled by the party, and the party delegates' nominees would appear automatically on the general election ballot with party endorsement. *N.Y. State Bd. of Elections v. Lopez-Torres*, 552 U.S. 196, 200-01 (2008). New York delegated a role in the election

process to the political parties by giving them the right to have the candidates the *political parties* selected appear with party endorsement on the general election ballot. *Lopez-Torres*, 552 U.S. at 203. Under the Pennsylvania Election Code, the power to select the candidates who will appear on the general election ballot is delegated to the registered voters of each party, not to the parties themselves. The absence of any delegated role in the primary election process makes this case distinguishable from *Lopez-Torres*.

For the foregoing reasons, the Third Circuit's decision does not conflict with this Court's decisions in *Smith*, *Terry*, or *Lopez-Torres*, but rather correctly distinguished those cases based on the facts and statutory scheme at issue in each case.

B. The Court Has Never Addressed the Issue of Whether a Political Party is a State Actor Without Examining the Applicable Statutory Electoral Scheme.

This case does not raise an important question of federal law that has not been, but should be, settled by the Court. This Court has never addressed the issue of whether a political party is a state actor in a vacuum. The Court has always considered the relevant statutory electoral scheme at issue in each case. Because it is well-settled that there must be a nexus between a private party and the state in order for there to be state action, the Court necessarily must examine the applicable statutory electoral scheme, as it did in *Smith*, *Terry* and *Lopez-Torres*, to determine what power, if any, has been delegated to the political party in question.

The power delegated to political parties in a primary election varies greatly state-by-state depending on a particular state's applicable statutory scheme. For example, under the Pennsylvania Election Code, the Commonwealth has delegated to the party electorate, not to the political parties themselves, the power to determine who will appear as a candidate on the general election ballot. Only after analyzing the Pennsylvania Election Code was the Third Circuit able to correctly determine that the RCLC was not a state actor in Pennsylvania's primary election. The Court cannot create a categorical rule regarding the status of political parties in primary elections because the state action element is fact specific and depends on the specific power, if any, delegated under a state's applicable statutory electoral scheme.

II. PETITIONER MISREPRESENTS THE PENNSYLVANIA ELECTION CODE, THE ROLE OF THE RCLC IN CONNECTION WITH PENNSYLVANIA'S PRIMARY ELECTION, AND THE RECORD.

Petitioner's Petition for Writ of Certiorari, like all of her documents filed in this litigation, misrepresents the applicable provisions of the Pennsylvania Election Code. Petitioner incorrectly and repeatedly states that "Respondents are, in fact, the very legal entity to whom the Commonwealth delegated its sovereign power to determine who shall appear on its general election ballot." (Petition p. 10). As discussed above, the Commonwealth, through the Election Code, has delegated this power directly to the registered voters in each party, not to the political parties. Additionally, Petitioner misrepresents that the RCLC must elect its members during and through the primary election.

Although the RCLC selected that method for its membership selection, it also has the option under the Election Code to appoint its members. *See* 25 P.S. § 2837. The option to select members through the primary election is the RCLC's only official role in connection with the primary election. All other actions that are taken by the RCLC are voluntary and internal to the Committee.

The flawed premise of Petitioner's argument is reflected through the internal inconsistencies contained in her Petition for Writ of Certiorari. Petitioner at times correctly recognizes that "the State has vested the right to pick Respondents' general election candidates [in] the entire party electorate." (Petition p. 10). Despite this, Petitioner continuously states her false premise on the issue of state action, which Petitioner felt the need to repeat fourteen times in her Petition, that the "Commonwealth has delegated to the party the right to place the name of its candidates directly upon the general election ballot with party endorsement." (Petition p. 16).

Additionally, Petitioner falsely states that, under Pennsylvania's Election Code, the RCLC "is required to provide the Commonwealth the indispensable component of a general election – candidates." (Petition p. 18). The RCLC does not exercise any control over ballot access or decide who will or who will not appear on the ballot as a candidate in the primary or general election. The candidates themselves follow state mandated procedures to appear on the primary election ballot, and the registered voters decide which of those candidates will appear on the general election ballot.

As to the record, Petitioner misrepresents the structure of the RCLC by referring to it as the "central party apparatus," a blatant allusion to communism. (Petition p. 4). The RCLC consists of 468 elected committee members who represent the interests of the Republican Party in Lancaster County, and the RCLC operates under a democratic structure. Petitioner then refers to candidates without "leadership endorsement" making it appear as though only the party leaders decide which candidates the RCLC will endorse in the primary election. (Petition p. 5). A candidate becomes a RCLC endorsed candidate only when he or she receives the vote of a super-majority of the members of the committee present at the endorsement meeting.

Petitioner also misrepresents that Respondents threatened Petitioner by stating that her active opposition had triggered a police investigation against Petitioner. (Petition p. 5). Heath called Petitioner regarding a report that someone on the committee was campaigning against endorsed candidates. During the conversation, Heath allegedly stated to Petitioner, "They wouldn't give their names or anything, but they did get a license plate number so we are tracing a license plate right now." (Am. Compl. ¶ 50). Petitioner knew Heath did not have any such power since Petitioner knew that the tracing of license plate numbers can only be conducted by individuals exercising the police powers of the Commonwealth of Pennsylvania. (Am. Compl. ¶ 51).

Petitioner also misrepresents that the poll-workers allegedly sent by Respondents to observe and report back on Petitioner's primary day conduct were "armed with state poll-watching certificates" (Petition p. 5), an

allegation that does not appear anywhere in the Amended Complaint and is, in fact, false.

Finally, Petitioner misrepresents the record by stating that she constrained her speech to voters during the 2007 primary election as a result of Respondents' alleged threats. (Petition p. 5). In fact, Petitioner still worked at her voting district's polling station and handed out "slate cards," printed at her own expense, to Republican voters encouraging them not to vote for two of the RCLC endorsed candidates, but to vote, instead, for another candidate who had failed to receive the RCLC's endorsement.

III. PETITIONER FAILED TO STATE A CLAIM UNDER SECTION 1983 BECAUSE RESPONDENTS ARE NOT STATE ACTORS AND PETITIONER WAS NOT DEPRIVED OF ANY RIGHT SECURED BY THE CONSTITUTION.

The Third Circuit, based upon well-established law, properly affirmed the dismissal of Petitioner's Amended Complaint for failure to state a claim under 42 U.S.C. § 1983. Petitioner's Amended Complaint fails to allege facts showing and, based on Pennsylvania's Election Code, Petitioner could not allege facts necessary to state, that Respondents are state actors or that they acted under color of law. The Commonwealth of Pennsylvania has not delegated any power or authority to the RCLC in connection with the primary, as discussed above.

Because Petitioner cannot meet the state action element necessary to state a claim under Section 1983, the lower courts did not address the second element

regarding the alleged violations of Petitioner's First Amendment rights. However, Petitioner's Amended Complaint also fails to allege facts showing that Respondents violated any of Petitioner's rights under the Constitution or federal law. Petitioner was not deprived of any right secured by the Constitution. As Petitioner notes in her Petition, "The right to compete, free from *state interference*, is all the First Amendment guarantees." (Petition p. 20) (emphasis added). While Petitioner unquestionably enjoys First Amendment rights, she only holds these rights as against government abridgement, not as a Republican committeewoman against the RCLC, a private political organization with no official, state sanctioned role in Pennsylvania's primary election.

Petitioner also failed to allege a constitutional injury. Petitioner was not sanctioned, censured, or disciplined in any way for her conduct, nor could she be under the RCLC's bylaws, a fact which Petitioner knew at the time of her alleged actions. Any limitations allegedly placed on Petitioner's ability to freely campaign during the primary election were voluntarily imposed by Petitioner herself.

Additionally, Petitioner contends that she holds First Amendment rights against the RCLC, as a committee member of the RCLC, and that her rights take priority over the RCLC's long-recognized, core First Amendment speech and association rights as a private political organization, including the rights to select its message and standard bearer and to determine with whom it will and will not associate. The Court has repeatedly reaffirmed the primacy of political parties' rights of association and speech under

the First and Fourteenth Amendments of the United States Constitution.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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